Supreme Court, U.S.
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No. 04-219

IN THE

Supreme Court of the United States

RICHARD SHUMSKY, Chief Probation Officer,
Los Angeles County,

Petitioner,

v.

EDMUND Y. CHEIN,

Respondent.

On Petition For Writ Of Certiorari
To The U.S Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

STEVE COOLEY
District Attorney of Los Angeles County
ROBERT SCHIRN
Head Deputy, Appellate Division
BRENTFORD J. FERREIRA
MATTHEW G. MONFORTON (*Counsel of Record*)
Deputy District Attorneys
320 West Temple St., Ste. 540
Los Angeles, California 90012
(213) 974-5911

Counsel for Petitioner

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PETITIONER'S REPLY BRIEF

I THE STATE DID NOT "WAIVE" ISSUES RELATED TO § 2254(d)

Respondent Chein claims that the State has waived issues related to the applicability of § 2254(d) to *Jackson* claims. (Opp. at 5-7.) His argument suffers from two flaws.

First, issues relating to a federal court's jurisdiction cannot be waived. *Clinton v. City of New York*, 524 U.S. 417, 428 (1998) (applicability of statute "pose[d] a jurisdictional question" which was not waived by failure to raise it in district court); *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981). *Sumner* is particularly instructive. In that case, the custodian in a habeas corpus matter failed to argue an issue relating to the pre-AEDPA version of § 2254(d). This Court held that the issue was jurisdictional and thus could not be waived. *Sumner*, 449 U.S. at 547 n.2; see also *Brown v. Allen*, 344 U.S. 443, 460 (1953) ("Jurisdiction over applications for federal habeas corpus is controlled by statute"). Because AEDPA has significantly narrowed the scope of federal habeas review of state court convictions since *Sumner* was decided, it follows *a fortiori* that the propriety of applying § 2254(d) continues to be a jurisdictional issue and, thus, cannot be waived. *Eze v. Senkowski*, 321 F.3d 110, 121 (2d Cir. 2003) (custodian cannot waive standard of review mandated by §2254(d)(1)).

Second, no waiver occurs when an issue is "pressed or passed upon below." *U.S. v. Williams*, 504 U.S. 36, 41 (1992). This rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon" by the lower court. *Id.* at 41. In this matter the en banc majority discussed the issue of which portion of AEDPA, if any, applied to *Jackson* claims. (A119 to A120.) The majority then proceeded to apply AEDPA to the state appellate court's decision, albeit in conclusory

language.[1] Given that the majority passed upon the AEDPA issue by reviewing the state court decision for reasonableness, petitioner is entitled to challenge how the majority performed that application. Of course, underlying the question of *how* AEDPA applies to *Jackson* claims is the prefatory question whether AEDPA applies to them *at all*. Thus, petitioner may not only properly discuss this issue as well, but make note of the inconsistencies among the lower courts which have already addressed it. *Cf. Cuyler v. Sullivan*, 446 U.S. 335, 342 n. 6 (1980) (in determining whether possible conflict of interest by privately retained attorney violates defendant's right to counsel, this Court addressed antecedent issue of whether such representation constitutes state action.)

Chein's reliance on *Adarand Constructors, Inc. v. Mineta,* 534 U.S. 103 (2001) is misplaced because of two obvious distinctions between that case and the case at bar which he fails to acknowledge. First, the lower court in *Adarand* never passed upon the issue of whether certain race-based programs were constitutional. *Id.* at 108. Second, this Court observed that were it to address the issue raised, it would have had to consider "voluminous evidence that ha[d] never been presented to any lower court." *Id.* at 109. By contrast, in this case the Ninth Circuit directly addressed the issue of AEDPA's applicability in *Jackson* cases. Moreover, unlike the issue in *Adarand*, the standard of review in an AEDPA case is an issue of law which does not require consideration of "voluminous evidence" or, indeed, any evidence at all.

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[1] For example, the majority's application of AEDPA to the "university" count consisted of a one-sentence footnote. (A138 n. 8.) At least one Ninth Circuit jurist has noted that such conclusory findings of unreasonableness are all too common from the Ninth Circuit, which has demonstrated its "apparent inability to internalize AEDPA's strict standard of review that is a source of repeated public embarrassment." *Kennedy v. Lockyer*, 372 F.3d 1013, 1040 (9th Cir. 2004) (O'Scannlain, J., dissenting) (noting numerous summary reversals of Ninth Circuit AEDPA cases by this Court.)

For these reasons, petitioner has properly raised in this Court the failure of the en banc majority to correctly apply the appropriate deferential standard of review, as mandated by § 2254(d), to the California Court of Appeal's sufficiency-of-the-evidence holding in the instant matter.

II THE NEED FOR UNIFORMITY IN REVIEWING THE NUMEROUS *JACKSON* CLAIMS FILED IN FEDERAL HABEAS COURTS BY STATE PRISONERS REQUIRES REVIEW BY THIS COURT

Chein concedes the existence of a divergence by the lower courts on the question of whether *Jackson* claims should be regarded as issues of law or of fact and thus whether § 2254(d)(1) or (d)(2) should apply. (Opp. Brf. at 9.) He also acknowledges the existence of numerous post-AEDPA cases in which appellate courts have reviewed *de novo,* rather than deferentially, state court decisions denying *Jackson* claims. (Opp. Brf. at 8.) Chein nevertheless contends that this case presents no questions worthy of this Court's review. (Opp. Brf. at 9.) He is wrong because, as shown below, there are least four reasons why this Court should settle the issue of how (and if) AEDPA applies to *Jackson* claims.

1 This Court has Already Deemed the Standard of Review in *Jackson* Cases to be an Issue of National Importance

Perhaps because of the sheer numbers of insufficiency-of-the-evidence claims that have congested the courts in the wake of *Jackson*,[2] this Court has already labored over the

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[2] See *Habeas Relief for State Prisoners*, 91 Geo. L.J. 817, 824 (2003); see also Chad M. Oldfather, *Appellate Courts, Historical Facts, And The Civil-Criminal Distinction*, 57 Vand. L. Rev. 437, 489 n. 228 (2004) (*Jackson* claims "are among the most common on appeal").

issue of how much deference to accord state court denials of *Jackson* claims in federal habeas proceedings. *Wright v. West*, 505 U.S. 277, 280 (1992). In *Wright*, Justice Thomas contended that a deferential standard of review should apply. *Id.* at 291. Though this view was not endorsed by a majority of the members of this Court, Justice Thomas's plurality opinion in *Wright* was the likely catalyst prompting Congress to amend § 2254(d) as part of its AEDPA reforms.[3]

Despite these efforts by both Congress and this Court, federal habeas courts continue to utilize inconsistent standards in reviewing the numerous *Jackson* cases docketed each year. In fact, several have expressly conceded having uncertainties on this issue. See, *e.g.*, *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004) ("The question whether AEDPA requires an additional degree of deference to state courts' resolution of sufficiency of the evidence claims is unsettled in our circuit."); *Dockins v. Hines*, 374 F.3d 935, 939 (10th Cir. 2004) (Tenth Circuit "has never clearly settled whether we treat sufficiency of evidence issues as a question of law or a question of fact"). Should this inconsistency persist, many "state appellate decisions will continue to receive no deference, and the AEDPA will have had zero effect on this contentious area of habeas corpus law." *Gomez v. Acevedo*, 106 F.3d 192, 200 (7th Cir. 1997), *rev'd on other grounds sub nom, Gomez v. DeTella*, 522 U.S. 801 (1997). The issue ought to be addressed definitively by this Court.

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[3] See *The Supreme Court, 1999 Term–Leading Cases, 114 Harv.L.Rev. 319, 325 (2000)*; Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 Duke L.J. 947, 1033 (2000); *see also Williams v. Taylor*, 529 U.S. 362, 410-11 (2000) (opinion of O'Connor, J., for the Court) (implying that Congress may well have codified Justice Thomas's *Wright* opinion in AEDPA); *but see id.* at 380 n. 11 & 387 n. 14 (opinion of Stevens, J.) (disagreeing that AEDPA codifies the Justice Thomas approach in *Wright* but acknowledging that "[i]t is not unusual for Congress to codify earlier precedent in the habeas context").

2 AEDPA Requires Substantial Deference to State Court Denials of *Jackson* Claims, Thereby Mandating Application of *Thompson's* "No-Evidence" Rule When Such Claims are Reviewed by Federal Habeas Courts

The reasonableness standard imposed by AEDPA dramatically alters the standard of review for *Jackson* claims raised in federal habeas corpus petitions by state prisoners. Federal habeas relief is thus unavailable to a state prisoner even when the state court *incorrectly* determines the evidence to be sufficient to support the conviction, so long as that assessment is *reasonable*. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) ("[t]he 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous.")

As discussed earlier, state court denials of *Jackson* claims should be virtually unassailable. (Petn. for Cert. at 9.) Relief on federal habeas should thus be denied so long as there is *any* evidence to support the elements of the crime. When properly applied to a *Jackson* claim that has already been examined by a state court on the merits, AEDPA essentially resurrects the "no-evidence" test first announced in *Thompson v. City of Louisville*, 362 U.S. 199 (1960).[4] This Court should therefore use this case to inform the lower courts that federal habeas relief may no longer be granted on a state prisoner's *Jackson* claim unless there is an element of the crime for which no evidence exists in the record.

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[4] In *Thompson*, a case in which this Court held that a conviction "totally devoid of evidentiary support" constituted a violation of due process, the Court also noted that a "[d]ecision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." *Thompson*, 362 U.S. at 199.

3 Applying AEDPA to *Jackson* Claims Promotes Congress's Goals of Expediting Habeas Review and Avoiding Federal Habeas "Retrials" of State Convictions.

Besides seeking to enhance the finality of state convictions, Congress also enacted AEDPA in order to "curb delays" in federal habeas proceedings as well as to "prevent 'retrials' on federal habeas." *Williams*, 529 U.S. at 364; see also *Gomez*, 106 F.3d at 200 (*de novo* review of *Jackson* claims criticized because "Congress, in short, does not want federal courts duplicating the review of state court systems.") Thus, Congress sought to affect not only the *outcome* of federal habeas corpus cases involving state convictions, but also the *efficiency* of the federal courts in reaching those outcomes.

Continued *de novo* review of *Jackson* claims by federal habeas courts will undermine this goal. A significant number of delays and "retrials" in federal habeas proceedings resulted from this Court replacing *Thompson's* "no-evidence" rule with *Jackson's* sufficiency-of-the-evidence standard, a consequence noted by Justice Stevens:

> The Court indicates that the [sufficiency-of-the-evidence] standard to be applied by federal judges in habeas corpus proceedings may be substantially the same as the standard most state reviewing courts are already applying. The federal district courts are therefore being directed simply to duplicate the reviewing function that is now being performed adequately by state appellate courts.

Jackson, 443 U.S. at 336 (Stevens, J., concurring) (citations omitted). Justice Stevens accurately predicted the burdens that *Jackson* would impose upon federal habeas courts:

> [B]ecause the "rational trier of fact" must certainly base its decisions on *all* of the evidence, the Court's broader standard may well require that the entire transcript of the state trial be read whenever the factfinders' rationality is challenged under the Court's rule. Because this task will confront the courts of appeals as well as district courts, it will surely impose countless additional hours of unproductive labor on federal judges and their assistants. . . . The addition of a significant volume of pointless labor can only impair the quality of justice administered by federal judges and thereby undermine "the respect and confidence of the community in applications of the law."

Id. at 338-39 (Stevens, J., concurring) (citations omitted).[5]

Because the statute requires reviewing the "decision" of the state appellate court, AEDPA obviates the need for a time-consuming review of the trial record by a federal habeas court in order to evaluate a state prisoner's insufficiency-of-the-evidence claim. § 2254(d).[6] A state appellate court which denies a *Jackson* claim has already combed through the trial record in order to determine whether sufficient evidence exists to prove each element of the crime beyond a reasonable doubt. A review of the reasonableness of the state

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[5] The case at bar illustrates the additional burdens *Jackson* claims by state prisoners impose upon the federal judiciary. Shortly after the parties argued this matter before the Ninth Circuit's en banc court, the court asked the parties to transmit a copy of the entire record consisting of a six-volume clerk's transcript (totaling 1394 pages) and a four-volume reporter's transcript (totaling 1359 pages) despite the parties themselves having previously designated a much smaller portion of the record.

[6] The statute technically requires review of the decision by a "state court" rather than a state *appellate* court. § 2254(d). However, the requirement that state prisoners exhaust state remedies before seeking federal habeas relief ensures that the state court decisions relevant for purposes of AEDPA most often will be those rendered by state appellate courts rather than state trial courts. § 2254(b)(1)(A)

appellate court's decision can be accomplished simply by determining if the decision cites any evidence from the record to support the elements of the crime. Only if the state appellate court decision contains no evidence to support an element would a federal habeas court then have to examine the trial record in order to adjudicate the claim.

This procedure is consistent with the plain language of AEDPA and would effectuate Congress's goals of curbing delays and preventing federal habeas "retrials." For this reason as well as for the reason discussed in Part 2, *supra*, AEPDA is properly viewed as resurrecting *Thompson*'s no-evidence rule, at least for cases on collateral review.

4 This Court Should Hold That AEDPA Requires Federal Habeas Courts Reviewing State Court Denials of *Jackson* Claims to Adhere to the State Court's Interpretation of the Underlying State Criminal Statute

A proper application of AEDPA to *Jackson* claims also requires a federal habeas court to interpret the underlying state criminal statute in the same manner as the state appellate court did in its denial of the claim on direct review, an argument discussed in detail at pages 10-14 in the State's Petition for Certiorari. Numerous federal habeas courts have granted relief on *Jackson* claims by skewing state court interpretations of state criminal statutes. (see Petn. for Cert. at pp. 10-11). The question of which tribunals, state appellate courts or federal habeas courts, have the final word on interpreting state criminal statutes is often dispositive in *Jackson* cases, because "[e]vidence can be insufficient only in relation to a rule of law." *Bates v. McCaughtry*, 934 F.2d 99, 102 (7th Cir. 1991).

This issue is pertinent to the instant matter because the en banc majority, in determining whether sufficient evidence

supported Chein's perjury convictions, shoehorned the word "probably" into the state law definition of "materiality." The Ninth Circuit's modification of California perjury law transcends mere semantics. For example, the purchase of a ticket in one of the multi-state lotteries held throughout the nation is sufficient evidence to prove that the purchaser "might win the lottery" or "could win the lottery." If, however, the conclusion to be proved is that the purchaser "could *probably* win the lottery," considerably more evidence would be required.

In his opposition brief, Chein cites several California opinions defining a material statement under state perjury law as one which "could probably have influenced the outcome of the proceedings." (Opp. Brf. at 14.) He neglects to note that other state cases omit the term in their holdings.[7]

Chein's analysis of this issue, however, suffers from a more fundamental flaw. The issue before this Court is whether the California Court of Appeal's application of *Jackson* to the California perjury statute -- as the statute is interpreted *by that court* -- is unreasonable, not whether that court's denial of Chein's *Jackson* claim was unreasonable under a different interpretation of California law. Assuming, *arguendo*, that the California Court of Appeal defined "materiality" incorrectly, Chein utterly fails to explain how AEDPA permits federal habeas relief for this alleged state law error.

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[7] See *People v. Kobrin*, 903 P.2d 1027, 1028 (Cal. 1995) ("we conclude that a constitutionally valid perjury conviction ... requires the jury, not the court, to determine all elements of the charge including materiality, *i.e.*, whether the statement or testimony 'might have been used to affect [the proceeding in or for which it was made].' ") (brackets in original); *People v. Gray*, 127 P.2d 72, 90 (Cal. Ct. App. 1952) ("The test of perjury is not whether the false testimony actually does influence the tribunal or jury but whether it can influence it"); *People v. Patterson*, 221 P. 394, 396 (Cal. Ct. App. 1923) ("The test [for materiality] is whether the statement made could have influenced the tribunal on the issue before it.").

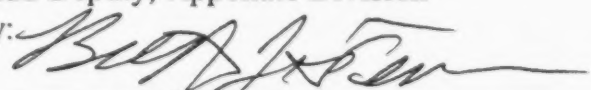
Chein also tries to explain that the definition of "materiality" relied upon by the California Court of Appeal in affirming his conviction is somehow consistent with the one employed by the Ninth Circuit's en banc majority. (Opp. Brf. at 15.) His assertion is puzzling because at no time did the state appellate court insert the word "probably" into its definition of materiality. Given this fact, and given the extensive debate between the en banc majority and dissent on the definition of "materiality," (see A122 to A124; A142 to A143), Chein's claim that this issue is much ado about nothing rings hollow. On the contrary, when the definition of "materiality" -- as employed by the California Court of Appeal in the instant matter -- is applied to the facts of this case, his claims of insufficiency of the evidence collapse.

CONCLUSION

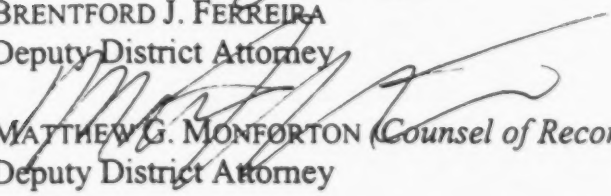
For all of the foregoing reasons, the State respectfully requests that this Court grant its petition for certiorari.

Dated: September 22, 2004

Respectfully submitted,

STEVE COOLEY
District Attorney of Los Angeles County
ROBERT SCHIRN
Head Deputy, Appellate Division
By: 

BRENTFORD J. FERREIRA
Deputy District Attorney



MATTHEW G. MONFORTON *(Counsel of Record)*
Deputy District Attorney

Counsel for Petitioner